116th Session **Judgment No. 3297**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. S. against the European Patent Organisation (EPO) on 27 August 2010 and corrected on 21 December 2010, the EPO's reply of 7 April 2011, corrected on 12 May, the complainant's rejoinder dated 23 June, corrected on 24 July, the EPO's surrejoinder of 27 September, the complainant's additional submissions of 19 December 2011, and the EPO's final comments of 23 July 2012;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant joined the European Patent Office, the EPO's secretariat, in 1990. Prior to his dismissal on 1 June 2009, he was assigned to the post of Formalities Officer at grade B3.

Early in 2008 the EPO initiated disciplinary proceedings against the complainant on the basis of, inter alia, two documents. The first is a work certificate dated 14 August 2008 – bearing the EPO seal –

which certifies that Ms A. was employed by the EPO as from 3 September 2007 at grade B3 with details of her annual salary and a monthly expatriation allowance. The document lists the complainant as a contact person for its verification and sets out his EPO telephone number. The second document, a job specification issued on the official EPO form and stamped with the official EPO seal, indicates that Ms A. was appointed as "Formalitie Officer starting her [d]uty on 3rd of September 2007 in the European Patent Office in Rijswijk". Both documents were presented to a local real estate agency in order to obtain a tenancy agreement for one of its premises. In November 2007, the police raided the premises and discovered professional cannabis growing equipment in the rented premises.

By a letter of 4 February 2008 the complainant was informed by the Director of Personnel that, based on the aforementioned documents it appeared that the Office's name, reputation and property had been abused so that Ms A., who had never worked for the EPO, could rent a house which the complainant had previously rented. The complainant was asked to provide his comments by 8 February 2008.

In his reply of 8 February the complainant stated that neither the handwriting nor the signature on the work certificate were his and he declared that he had never rented the premises in question.

In February 2008 the EPO conducted further investigations into, inter alia, communications that were sent or received by the complainant's EPO e-mail address and telephone extension during the material time.

The complainant was informed by a letter of 25 February 2008 of the President's decision to suspend him from service immediately until 15 March 2008, and of the Administration's intention to initiate disciplinary proceedings against him.

The EPO reported the matter to the Dutch police on 21 February 2008.

On 10 March 2008 the Administration referred the case to the Disciplinary Committee for an opinion on the appropriate disciplinary measure, pursuant to Article 102 of the Service Regulations for

Permanent Employees of the European Patent Office. The complainant was accused of deliberately forging and falsifying documents and/or assisting in forging and falsifying documents aimed at falsifying the identity of Ms A. in order to enable her to obtain a material advantage in the form of a tenancy agreement.

At the Disciplinary Committee's hearing in May 2008, the complainant, inter alia, denied knowledge of the work certificate and job specification and he claimed that someone else must have been using his phone and computer. He also denied knowing Ms A.

At the request of the Disciplinary Committee the EPO commissioned an examination of a copy of the hard disk from the complainant's computer by an external company which delivered its investigation report on 28 July 2008. The report indicated that the EPO job description template was opened on 14 August 2007 on the complainant's computer which had also been used to search online for information regarding Ms A. In addition, no attempts to log on to the computer with another user account could be found and there were no traces of remote access.

On 29 December 2008 the Disciplinary Committee delivered its opinion. It found that the facts established in the course of its enquiry, constituted "overwhelming circumstantial evidence that [the complainant] ha[d] deliberately forged and falsified documents and/or assisted to forging and falsifying documents with the aim to falsify the identity of [Ms A.] and enable her to obtain a material advantage by obtaining a rent agreement". In doing so, he had misused the Office's name and reputation by, among other things, an inappropriate and unauthorised use of the official EPO seal and letterhead. Considering the very serious nature of the offence and that the relationship of trust necessary for continuing the complainant's employment had irretrievably broken down, the Committee recommended imposing the disciplinary measure of dismissal. It further recommended that the complainant should reimburse the costs of the external investigation to the EPO, which amounted to 15,211.92 euros.

On 14 January 2009 the President informed the complainant that she *prima facie* intended to follow the Committee's recommendations

and she invited him to provide a response. On 20 January the complainant met with a member of Legal Services. During the meeting he denied forging documents and any knowledge of Ms A. and he requested a less severe sanction on the ground that dismissal was disproportionate.

On 29 January 2009 the President of the Office endorsed the findings and recommendations of the Disciplinary Committee, dismissed the complainant from service with effect from 1 June 2009, and informed him that the amount of 15,211.92 euros would be recovered from him in order to cover the costs of the external investigation.

By a letter of 27 April 2009 the complainant lodged an internal appeal against the President's decision of 29 January 2009, arguing that he had been wrongly accused of involvement in forging documents, as these allegations were not proven, and claiming reimbursement of the costs of the external investigation.

In its report of 15 April 2010 the Internal Appeals Committee (IAC) found that the conclusions of the Disciplinary Committee were legally sound. The complainant's defence that a third party must have forged the documents without his knowledge or assistance was excluded with sufficient certainty by the evidence and he had failed to adduce facts to rebut that evidence. In particular, it could be inferred that he had known that third parties were forging documents or had negligently endured such acts. The IAC noted that the Disciplinary Committee had not assumed that the complainant had forged the documents himself, rather it found that the misconduct could still be attributed to him as he had at least aided and abetted a third party in issuing documents on behalf of the EPO. The Committee found the sanction of dismissal proportionate to his misconduct. However, it recommended that he be reimbursed the costs of the external investigation.

By letter of 9 June 2010 the complainant was informed of the President's decision to follow the unanimous recommendations of the IAC to reject his internal appeal as unfounded on the merits, and to reimburse him the costs of the external investigation, with interest. That is the impugned decision.

B. The complainant contends that there is insufficient evidence to show that he was guilty of misconduct. In his view, the Disciplinary Committee and the IAC failed to apply the correct standard of proof. Although there were indications of a link between him and the events in question, such evidence was circumstantial and by no means proof of any offence. Moreover, as he knew nothing of the events, the only evidence he could offer in rebuttal was necessarily circumstantial as well. He argues that no efforts were made to investigate other possibilities. He asserts that his identity was stolen and misused, that the EPO failed to establish a coherent chain of evidence and that evidence in his favour was dismissed in a cavalier manner.

While recognising that disciplinary hearings and the internal appeal processes are distinct from criminal processes, the complainant argues that their effect can be just as devastating and therefore, that a standard of proof at least approximating that of the criminal law burden of proof should apply. Both Committees failed to recognise that the external investigation report showed no more than that his computer and telephone had been used by someone else. Recognising that the facts were "no proof" of the allegations made against him, the Disciplinary Committee concluded nevertheless that the external investigation report "showed conclusively [his] direct and personal involvement".

The complainant submits that the EPO staff members who conducted the first enquiry displayed an "extremely hostile attitude" towards him. He also contends that the EPO used its influence to induce the Dutch police to reopen and pursue their investigation into the matter.

The complainant argues that the impugned decision is in breach of the Service Regulations, in particular Article 95(5), which provides that if an employee is subject to criminal proceedings for the conduct giving rise to his or her suspension, a final decision in his or her case shall be taken only after the verdict of the court hearing the case has become final. As the criminal court rendered its judgment on his case on 10 August 2010, the President's decision of 9 June 2010 was taken in breach of the Service Regulations and constitutes an abuse of

power. He points out that by a letter of April 2010 he asked the EPO to withhold its final decision until the verdict in the criminal case was rendered and, by a letter of 4 June 2010 he further informed the EPO that the prosecutor had confirmed that the case would be heard as soon as possible. The fact that the President took her decision five days later shows a wilful breach of the rules.

Lastly, the complainant argues that he was not notified of the investigation of his computer by the external company, contrary to Article 8 of the Guidelines for the Protection of Personal Data in the European Patent Office. He submits that his privacy was violated by the EPO, as the details of the allegations were widespread throughout the Organisation.

The complainant seeks oral proceedings. He asks the Tribunal to order the EPO to reinstate him in his post, to grant him an invalidity pension and to reimburse his salary and related allowances with retroactive effect from the date of his dismissal until he is granted an invalidity pension, with interest. He claims material damages, moral damages in the amount of at least 1,000,000 euros, punitive damages in the amount of at least 100,000 euros, and costs. He asks the Tribunal to lift the immunity, from criminal or civil actions, of any EPO staff members who are "shown to have behaved wrongly".

C. In its reply the EPO recalls the Tribunal's case law regarding the standard of proof applied in disciplinary cases and points out that, to prove charges beyond reasonable doubt, the Tribunal does not require absolute proof, but "a set of precise and concurring presumptions of the complainant's guilt". In cases where direct evidence is not available, circumstantial evidence may be relied on as a means of proof, provided that the facts established constitute strong circumstantial evidence of the imputability of the facts to the complainant. In the EPO's view, the charges were proven beyond reasonable doubt, and the complainant has not provided evidence to rebut them, nor has he provided a credible explanation in his favour.

Further, the EPO denies the complainant's allegation of bias in the conduct of the internal proceedings and submits that it is

unsubstantiated. It points out that the Disciplinary Committee expressly considered the little evidence provided by the complainant, and provided specific arguments why this evidence was not convincing. The IAC reviewed the evidence and denied that the Disciplinary Committee made any errors of fact or that it drew any erroneous conclusions from the facts and evidence. Indeed, the IAC considered the complainant's evidence as either contradictory, or of low probative value, and thus not able to rebut the overwhelming evidence against him. His main defence, which consists in arguing that a third party misused his identity, was found not credible.

The EPO firmly denies that it used its influence to induce the Dutch police to reopen the case. It explains that, as the external investigation report contained ample evidence, the results of the police investigation became less essential for the purposes of the disciplinary proceedings. The EPO stresses that it based its charges against the complainant not on a criminal conviction, but on fraudulent behaviour and breach of integrity and the staff member's duties under the Service Regulations. The outcome of the disciplinary proceedings was not dependent on obtaining a criminal conviction under Dutch law. The EPO merely noted that the complainant's conduct might have relevance under the applicable domestic criminal law and informed the national authorities accordingly, pursuant to Article 20 of the Protocol on Privileges and Immunities of the European Patent Office.

As regards the complainant's acquittal by the Dutch court, the EPO points out that criminal and disciplinary proceedings are separate and pursue different aims. A disciplinary measure may be imposed even where the staff member is not found guilty of any criminal offence. Moreover, Article 95(5) of the Service Regulations is not applicable in the complainant's case given that, at the time of the impugned decision, the criminal proceedings had still not commenced. The official notification of the scheduled hearing was not provided to the EPO until 8 July 2010 and was received on 12 July. In any case, the complainant's acquittal under domestic criminal law does not in itself render the EPO's disciplinary assessment of the misconduct erroneous or invalid. The court did not contest the facts established by

the EPO or refer to new facts unconsidered by the EPO, nor did it claim that the facts upon which the dismissal was based were inaccurate. It merely gave a different assessment based on standards applicable in national criminal proceedings.

The EPO denies that it breached the Guidelines for the Protection of Personal Data, and points out that the complainant is mistaken to refer to Article 8(3) thereof. It submits that the applicable provision in his case, Article 8(2), was fully complied with, as the data protection officer was consulted and gave his consent before the e-mail and internet accounts and the personal phone call data were processed. The EPO asserts that the complainant was informed by the Disciplinary Committee at its hearing of 29 May 2008 of the investigation of his computer. He was provided with a copy of the report and was asked to provide his comments, which he did, after receiving several extensions to do so. He thus had all reasonable means and ample time to assert his rights. The EPO considers his claim for an invalidity pension to be unfounded, and his claim for lifting of immunity should be dismissed because his complaint is unsubstantiated and because the claim is beyond the Tribunal's jurisdiction.

D. In his rejoinder the complainant presses his pleas. He maintains that the findings by the external company did not exclude the involvement of third parties, and he adds that while the EPO misleadingly refers to the criminal law standard of "beyond reasonable doubt", it transpires from the documents that the actual standard of proof applied barely met the "balance of probability" test. Further, the complainant pleads abuse of power in that the President did not authorise the investigative steps, in breach of the Guidelines for the Protection of Personal Data. Lastly, he submits medical evidence to support his claim for an invalidity pension.

E. In its surrejoinder the EPO maintains its position in full. It points out that "reasonable doubt" is doubt based not merely on a theoretical possibility raised in order to avoid an unfavourable conclusion, but also one for which reasons can be drawn from the facts presented. It denies exerting any improper influence on the Dutch police and argues

that the Guidelines for the Protection of Personal Data do not require prior notification of the staff member concerned. Lastly, it points out that the claim for an invalidity pension was not included in the complainant's internal appeal, therefore it should be rejected as irreceivable.

F. In his additional submissions the complainant produces a translation of the judgment delivered on 6 December 2011 by the Appeal Court of The Hague, confirming the complainant's previous acquittal by the District Court of The Hague.

G. In its final comments the EPO states that there is nothing in the judgment of the Appeal Court of The Hague that would cast doubt on the material accuracy of the facts as established in the disciplinary proceedings or establish new facts that would have been relevant in those proceedings.

CONSIDERATIONS

1. In a letter dated 29 January 2009, the President of the EPO informed the complainant, a Formalities Officer at grade B3, inter alia that the Disciplinary Committee had "unanimously found [him] liable" for the charges of "forging and falsifying documents and/or assisting to forging and falsifying documents", that the Committee also held that he had "not provided any convincing or satisfactory evidence to rebut the charges raised against [him]", and that "the Disciplinary Committee unanimously considered as proven that [he had] failed to meet the required integrity standards and [had] put the Office's good name in jeopardy vis-a-vis third parties". On the basis of the findings and the seriousness of the offence, the Disciplinary Committee "unanimously recommended as appropriate the disciplinary sanction of 'dismissal' under Article 93(2)(f) of the Service Regulations" and also "recommended to request a recovery of the full costs of the [investigation] in the amount of EUR 15,211.92". After considering the complainant's written submissions, the President determined that "in view of the gravity of the case, the only

appropriate sanction [was] dismissal in accordance with the unanimous opinion of the Disciplinary Committee". The President went on to state that she had decided "to dismiss [the complainant] from service under Article 93(2)(f) of the Service Regulations", and that "[p]ursuant to Article 53(2)(b) and (3) of the Service Regulations", the decision would take effect on 1 June 2009, until which time he would remain suspended with full pay. The complainant was also notified that the amount of 15,211.92 euros would be recovered from him "to cover the costs of the computer expertise conducted by [the external company]" as recommended by the Disciplinary Committee.

2. The complainant filed an internal appeal against that decision and was informed, by letter dated 9 June 2010, that the President had considered the opinion of the IAC and had decided to accept its unanimous recommendation to reject the appeal as unfounded in its substance and to uphold the 29 January 2009 decision to dismiss him from service. The letter further indicated that the President had also decided to follow the unanimous opinion of the IAC with regard to the recovery of the costs of the external investigation which had been deducted from the complainant's salary upon his dismissal, and to reimburse him the full amount plus interest at 8 per cent per annum.

3. The complainant was subject to Dutch criminal hearings which resulted in a decision, rendered on 10 August 2010, acquitting him of all charges on the conclusion that there was insufficient legal evidence for the primary charges and that in particular, "alternate scenarios [could not] be excluded". In the decision of appeal, dated 6 December 2011, the court found that it had not been sufficiently proven that the complainant had committed the offences as charged.

4. The complainant filed his complaint before the Tribunal on 27 August 2010, impugning the decision of 9 June 2010 insofar as it upheld the decision to dismiss him from service. He claims that his dismissal was "illegal both on the grounds of serious infringements of

the Service Regulations (in particular but not only Article 95) and the failure of both the Disciplinary Committee and the Internal Appeals Committee to follow reasonable standards of evidence evaluation and concern for the rights of staff". He asserts that "the [EPO] conducted its investigations in an amateurish, incompetent and biased manner" and that it acted in breach of its data protection rules. His claims for relief are set out under B, above.

5. The complainant has applied for oral proceedings. The Tribunal, having examined the written submissions and their annexes and having found them sufficient, disallows the complainant's application.

6. The complainant asserts that as the President gave her decision on 9 June 2010, while the criminal court judgment was rendered on 10 August 2010 the EPO acted in breach of Article 95(5) of the Service Regulations which provides "[i]f, however, the employee is subject to criminal proceedings for the conduct giving rise to his suspension, a final decision in his case shall be taken only after a verdict of the court hearing the case has become final". He states that "[t]he final decision of the President was thus a flagrant breach of the Service Regulations, an abuse of power, wholly illegal and is thus null and void". He also claims that the EPO's representatives "displayed a hostile attitude towards him, amounting to harassment" but that "[o]bviously he cannot prove this". In response the EPO denies any display of hostile attitude or bias in the investigation and states that it based its charges against the complainant on fraudulent behaviour and on breach of integrity and the staff member's duties under Articles 5(1) and 14(1) of the Service Regulations. Furthermore, Article 102(2) of the Service Regulations which provides that "[i]n the event of proceedings before a court, the Disciplinary Committee shall act independently of such proceedings but may decide not to deliver its opinion until after the court has given its decision", allowed the Disciplinary Committee to act independently of the Dutch criminal court which had not yet even begun its proceedings. Article 102(3) requires that "[t]he appointing

authority shall take its decision within one month of the notification of the opinion of the Committee; it shall first give the employee an opportunity to be heard". The Disciplinary Committee rendered its opinion on 29 December 2008 and the President took her decision on 29 January 2009 in accordance with Article 102(3) of the Service Regulations. The criminal court proceedings came after the completion of the internal disciplinary hearings and the subsequent internal appeal proceedings. The EPO was notified by letter dated 8 July 2010 (received 12 July 2010) that the criminal proceedings would begin on 27 July 2010. As such, the Tribunal is of the opinion that the norm of Article 95(5) was respected as the EPO received official notification of the criminal court proceedings after the President had lawfully taken her final decision in conformity with the deadlines stipulated in the Service Regulations. Probably the better view is that the reference in Article 95(5) to "a final decision" is the original decision not the decision finally made after an internal appeal. But on the facts, this does not matter.

7. The elements, taken as a whole, which were considered by the EPO to form the basis of the assessment of guilt by the complainant are as follows:

(a) the complainant's name and office telephone number were listed as the contact information for verifying a document used by Ms A. to procure the lease;

(b) the salary and grade listed on the document were nearly identical to the complainant's;

(c) the expatriation allowance listed on the document was identical to that of the complainant;

(d) the uncommon spelling errors ("formalitie" instead of "formalities", "asasp" instead of "asap", "personal" instead of "personnel") on the document and in the e-mails were identical to ones he commonly used in other correspondence;

(e) the complainant's office phone was used to make three phone calls to the real estate agency and to make three phone calls to the mobile number provided by Ms A. as a contact number;

(f) his office computer was used on more than nine occasions: including once to access the Job Specification template, to make various internet searches regarding Ms A.'s name and the cultivation of marijuana, to access Ms A.'s personal e-mail account to send e-mails to the real estate agency (blind copying the e-mail to the complainant's office e-mail), to access the complainant's private e-mail account which included e-mails with subject lines referring to the property rented by Ms A.;

(g) an official EPO stamp/seal which had gone missing (and to which he had access) was used to validate the document used by Ms A.;

(h) the complainant did not bring any action against Ms A. after finding out that she had used his name and office number as contact person for her dealings with the real estate agency;

(i) he was in the main office building (often, had just returned from an hour-long break) and had logged into his computer shortly prior to the misuse of his phone and/or computer; and

(j) the timing between official and non-official (misuse) calls and e-mails was such that it made it nearly impossible for a third party to have been involved without the complainant's notice.

The Tribunal notes that the complainant, while contesting the conclusions reached, and denying all responsibility and/or involvement, does not contest the facts themselves. Also, the EPO "points out that the Dutch court did not state that the evidence and facts established by the defendant were inaccurate, nor did it identify any new facts which would necessitate a review of the defendant's conclusions. The court conceded that the results of the investigations 'indeed point to a possible involvement of the accused with the offences charged', but could not exclude alternative scenarios and thus considered that a criminal conviction under Dutch penal law could not be justified."

8. The Tribunal must determine whether a decision taken by virtue of a discretionary authority "was taken with authority, is in regular form, whether the correct procedure has been followed and, as regards its legality under the Organisation's own rules, whether the

Administration's decision was based on an error of law or fact, or whether essential facts have not been taken into consideration, or again, whether conclusions which are clearly false have been drawn from the documents in the dossier, or finally, whether there has been a misuse of authority" (see Judgment 191). The Tribunal states that while the EPO had the burden of proof, it is important to note that after it presented its "*prima facie* case" the complainant "failed to adduce any evidence tending to rebut it" (see Judgment 1828, under 11). The complainant submits the theory of identity theft but did not even raise charges against Ms A. when he was told that she had used a document naming him as contact person, nor does he put forward any evidence to support this idea. The Tribunal is of the opinion that the evidence presented by the EPO, taken altogether, cannot be ignored. "Those circumstances point convincingly to guilt and there is no credible innocent explanation for them. Further, the explanation offered by the complainant is implausible to a degree and is simply incompatible with the circumstances put in evidence by the Organization" (see Judgment 2231, under 5). The timing of the phone calls and e-mails is such that the idea of a third party entering the complainant's office to use his equipment and escaping prior to the official use of the equipment by the complainant (once with a margin of 30 seconds between calls) becomes entirely unrealistic. It can be considered even more improbable considering it had to have happened at least nine times. The Tribunal also finds it useful to note that both the Disciplinary Committee and the IAC unanimously found that the charges had been proven beyond a reasonable doubt and that the sanction of dismissal was proportionate to the offence. "The Tribunal will not require absolute proof, which is almost impossible to provide on such a matter. It will dismiss the complaint if there is a set of precise and concurring presumptions of the complainant's guilt" (see Judgment 1384, under 10). The Tribunal is of the opinion that the EPO did not violate its data protection rules during the investigation. The President requested the investigation, the data protection officer gave his consent, the complainant was presented with the information gathered and was given the opportunity to respond to the findings.

9. Considering the above, the Tribunal holds that the findings of the Disciplinary Committee and the IAC, and the subsequent final decision of the President, were not vitiated by any flaw which would lead the Tribunal to conclude that they should be set aside and therefore it dismisses the complaint as unfounded on the merits. The Tribunal reiterates that there was no violation of Article 95(5) as the final decision of the President came prior to the official notification of the start of criminal proceedings. The Tribunal also finds it useful to note that there were some inconsistencies in the facts relied upon by the District Court of The Hague. The court mentioned the complainant working in an "open office atmosphere", while in fact he worked in an individual office space; it considered that the EPO failed to investigate the testimony of one of the complainant's colleagues (that she had heard voices in his office one day) although the EPO did indeed take that into account during the investigation; and it considered that the possibility of a third party involvement could not be ruled out even though, as mentioned above, the timing of the illicit activities was too close to the official actions (calls or e-mails) of the complainant and too numerous to have realistically been carried out by a third party.

10. As the complaint fails on the merits, it is unnecessary to address any of the remaining claims which stem from the request to set aside the impugned decision. With regard to the claim for an invalidity pension, the Tribunal finds that that claim is irreceivable for failure to exhaust all internal means of redress. The claim requesting the lifting of immunity is outside the scope of the Tribunal's remit and will also not be considered (see Judgment 2190, under 3).

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 8 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Michael F. Moore
Hugh A. Rawlins
Catherine Comtet